KENAMERICAN RESOURCES INC.

2001-014-13

General Services Administration
FAR Secretariat (MVP)
1800 F. St., N.W
Room 4035
Washington, D.C. 20405.

Attn: Laurie Duarte.

Re: FAR Case 2001-014 (Proposed Rule)

Dear Ms. Duarte:

On behalf of KenAmerican Resources, Inc., I am writing to encourage the General Services Administration to adopt the rule proposed on April 3, 2001 which would rescind the final rule adopted on December 20, 2000 dealing with contractor responsibility and eligibility to provide goods and services to federal agencies. The April 3 rule should be adopted and the contractor responsibility and integrity provisions under the existing Federal Acquisition Regulations (FAR) should be maintained.

KenAmerican Resources, Inc. is a coal company with its operations in Muhlenberg County, Kentucky. From its underground mine, KenAmerican supplies more than two million tons of coal annually to the Tennessee Valley Authority at its Paradise electricity steam generating plant at Drakesboro, Kentucky. At this time, all of KenAmerican's production goes to the TVA Paradise plant. For this reason, our company has an immediate and significant interest in the outcome of the proposed rule.

The December 20 final rule is unfair and works a hardship on KenAmerican in two particular respects. First, it would authorize a contracting officer for TVA to determine our eligibility to provide coal based upon a price which may include costs associated with what the final rule describes as, "activities that assist, promote or deter unionization." Second, the final regulation interferes with the debarment and suspension regulations already in place at TVA and other federal procurement offices which affect a person's ability to enter a contract following the commission of a statutory or regulatory offense. For each reason, the April 3 rule should be adopted and the December 20 final rule should be revoked.

The December 20, 2000 final FAR rule, codified as 48 CFR §31.205-21, made "unallowable those costs incurred for activities that assist, promote or deter unionization." This means that KenAmerican is not only prohibited from selling its coal with that cost component

29325 Chagrin Boulevard • Suite 300 • Pepper Pike, Ohio 44122 • (216) 765-1240 • Fax (216) 765-2654

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included in the price, it is subject to audit and contract price adjustment for having included such costs in the price of the product. This is unfair and unreasonable.

Coal has been mined in Muhlenberg County in Western Kentucky for many decades. Historically, the miners who work in the underground mines in that area have been represented by the United Mine Workers of America (UMWA). KenAmerican opened the first coal mine in that county that was not represented by the UMWA in 1994. It did so over the opposition of the union. Since that time the UMWA has attempted to organize the mine without success. A vote on the question of representation was scheduled by the National Labor Relations Board in December, 2000. About one week before the vote, the union withdrew its request for the election.

Prior to the scheduled vote, the management at KenAmerican exercised its rights under the National Labor Relations Act and the First Amendment to discuss the vote with its hourly employees. In accordance with longstanding court decisions, the management neither threatened the employees nor did it promise them anything to vote against the union. It communicated, clearly and forcefully, that representation by the union was not in their self-interest. The management made its case based solely upon the facts. It obviously succeeded because the union withdrew its petition for recognition rather than lose the election.

Under the December final rule, these simple acts of communicating with our workers would be discouraged. Whatever costs we incurred for this activity would be disallowed in setting the price of our coal. This harsh consequence would arise notwithstanding the fact that our conduct was perfectly legal. We violated no law by communicating with our employees. Nevertheless, the FAR rule taints otherwise lawful conduct and discourages it by the economic penalty that it exacts on companies. This example symbolizes what is wrong with the final rule.

Equally noxious is the effect that the December 20 final rule has on the settled economic relations between a company and the federal agency that procures needed goods and services. Once again, the contractual relationship between KenAmerican and TVA amply illustrates this fact.

Coal mining is among the most regulated economic activities in the United Sates. Whether one considers the employment, occupational health and safety or the environmental aspects of mining and processing coal, it is heavily regulated by both state and federal agencies. If one of the statutes or regulations touching on these issues is violated, even inadvertently, the violation becomes a matter of public record. TVA is already entitled to inquire into the nature of the matter. It has the power to disqualify a company based upon past conduct. Under some circumstances, disqualification from securing future contracts is required. For example, if a company were convicted of a criminal violation of the Federal Water Pollution Control Act, 33 USC §1368(a) of that statute prohibits a federal agency from the future purchase of goods or services from the offender.

The December final rule, however, changes in subtle ways how a person who violates an environmental law is sanctioned. Under the example given above, no disqualification for the contracting party arises until a criminal conviction occurs. The December rule creates the

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potential for disqualification once a contracting party discloses *any* violation of an environmental regulation. The violation need not be a criminal one. Under the existing system, a conviction in a court of law is required before the disqualification arises. The December rule makes disqualification a possibility based upon the subjective judgment of the agency's contracting officer.

To make matters worse, the TVA and most federal agencies have regulations that provide for suspension and debarment of contractors. These regulations not only specify the type of conduct for which debarment may be imposed, but provide what steps may be taken to avoid or overcome the debarment. The certainty of the process afforded by these regulations is eliminated by the December rule. The final rule not only expands the list of actions that can be committed for which contractual disqualification may result, it creates a highly subjective process which creates uncertainty on persons regulated. This is not only unfair to contracting parties, it means that federal agencies have less certainty in maintaining a base of competitive and reliable parties from whom they can purchase needed goods. This is especially true for coal companies such as KenAmerican which supply a critical product for TVA.

In conclusion, KenAmerican supports the April 3 rule which proposes to revoke the December 20, 2000, and explicitly requests that the latter rule be rescinded. In addition, KenAmerican endorses the positions expressed by the National Alliance Against Blacklisting submitted on the proposed rule of June 30, 2000 in its comments dated August 29, 2000. It is unnecessary to repeat in detail those comments except to acknowledge that the validity of those views remain pertinent to the present rule.

Sincerely,

Blair M. Gardner

Blair M. Gardner
Assistant General Counsel and
Manager, Government and Public Affairs